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No. 09-34

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

PFIZER INC.,

*Petitioner,*

*v.*

RABI ABDULLAHI, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

Respondents, Nigerian children (and their guardians), have properly alleged that Petitioner Pfizer Inc. ("Pfizer") conducted medical experiments on them without informed consent in 1996, and that this illegal activity was undertaken in concert with the Nigerian government. Pfizer itself has claimed publicly that the Nigerian government knew of and approved Pfizer's actions, and the Complaints allege Nigeria's role in supervising the experiment, in covering up regulatory problems, and in quashing dissent to Pfizer's methods. Respondents have brought claims in United States courts, asserting those courts have jurisdiction pursuant to the Alien Tort Statute ("ATS"), 28 U.S.C. 1350. The questions presented are:

1. Whether a medical experiment administered without consent constitutes state action for purposes of ATS jurisdiction where the complaints allege that the state knew of, participated in, and tried to cover up misconduct associated with the experiment, and government facilities and personnel played a critical role in that experiment.

2. Whether, assuming no state action, complaints that a private actor has conducted nonconsensual medical experimentation on a population of uninformed and severely ill children state a claim for a violation of the law of nations that is actionable under the ATS.

## STATEMENT OF PARTIES

Respondents respectfully disagree with the list of Respondents stated in Petitioner's Rule 29.6 Statement and adopt the lists of parties in Appendices E and F of the Petition.

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## OPINIONS BELOW, JURISDICTION, AND STATUTORY PROVISION INVOLVED

Respondents agree with the statement of the Opinions Below, Jurisdiction, and Statutory Provision Involved as stated in the Petition.

## STATEMENT OF THE CASE

Pfizer's Petition should be denied. The Second Circuit's decision breaks no new ground, but, rather, represents a faithful application of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) to a unique and limited set of facts. As such, the Second Circuit's decision does not conflict with other circuits regarding either question Pfizer raises in its Petition. The highly unusual and discrete facts of this case make any decision rendered of limited precedential value, as it will turn on the assessment of factual allegations particular to this case and the pleading of a claim that presents circumstances not likely to be repeated.

For its statement of the case, Respondents adopt the procedural history of the action as set forth in the Second Circuit's opinion (Appendix to Petition for a Writ of Certiorari ("Pet. App.") 8a-15a) with the following by way of amplification of the factual underpinnings of the claims:

There is no real question that nonconsensual medical experimentation violates specifically defined international norms. Pfizer does not argue that consent was not required, but instead attempts to characterize its misconduct as mere technical failure in obtaining consent. *See, e.g.*, Petition for a Writ of Certiorari ("Pet.") at 23 ("Administering a clinical trial without *fully informed* consent is a matter customarily governed by

domestic administrative or tort law . . . .") (emphasis added).[1] Such mischaracterization obscures Pfizer's violations of basic human rights principles governing that conduct, with or without the presence of state action.

The Complaints allege that Pfizer, despite knowing that Trovan had the potential to cause serious side effects in children, nonetheless rushed at the opportunity to test children struck ill by a sudden bacterial meningitis epidemic in Northern Nigeria in 1996. Pet. App. 235a-236a. Pfizer occupied two wards of the Kano Infectious Disease Hospital ("IDH"), a public hospital, to conduct the Trovan experiment. Pet. App. 238a. These facilities were handed over to Pfizer by the Nigerian government. *Id.* The Nobel Prize winning organization Médecins Sans Frontières ("MSF"), also on location during the epidemic, deemed the facilities unfit for its own treatment efforts. *Id.* Pfizer's lack of attention to appropriate consent was appalling – Petitioner failed to inform families either that the treatment offered was experimental, or that MSF offered a non-experimental treatment recommended by the World Health Organization. Pet. App. 238a-239a. Moreover, no representative of Pfizer offered or read any informed consent document to Respondents. *Id.*

1. Pfizer appears to believe that consent is a matter of degree, varying with the domestic laws in place where its experiments are conducted – *i.e.*, that despite clear international norms governing consent, Pfizer can take advantage of its multinational status to conduct medical experimentation on children where regulation is weakest and the likelihood of accountability is most remote.

Pfizer's misconduct represents a gross violation of international legal norms prohibiting nonconsensual medical experimentation. These norms have been universal and well-defined since, at the latest, the years following World War II. Although arguably no specific treaty makes Pfizer's misconduct actionable, seminal international human rights documents as well as internationally accepted codes governing the practice of medicine and medical experimentation specifically make clear that the norm applies to private actors. Pfizer does not, and cannot, argue that it is not bound by the norm and is free to conduct nonconsensual medical experimentation anywhere at any time.

The Nuremberg Code's first principle states "[t]he voluntary consent of the human subject is absolutely essential." *United States v. Brandt ("The Medical Case")*, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Vol. II, 181-82 (1949). The Nuremburg Code expressly emphasizes this principle's applicability to private actors: "[T]he duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity." *Id.* at 182. Under the World Medical Association's Declaration of Helsinki: "In medical research involving competent human subjects, . . . the physician or another appropriately qualified individual must . . . seek the potential subject's freely-given informed consent . . . ." World Medical Association Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects ("Declaration of Helsinki") at B.24 (1964), (amended

2008), *at* http://www.wma.net/e/policy/pdf/b3.htm. The Declaration of Helsinki is "addressed primarily to physicians" – *i.e.*, physicians whether they be private actors or state actors. *Id.* at A.2. Further, the Guidelines of the Council for International Organizations of Medical Services state: "For all biomedical research involving humans the investigator must obtain the voluntary informed consent of the prospective subject . . . ." International Ethical Guidelines for Biomedical Research Involving Human Subjects, Prepared by the Council for International Organizations of Medical Sciences (CIOMS) in collaboration with the World Health Organization ("CIOMS Guidelines") at Guideline 4 (1993), (amended 2002), *at* http://www.cioms.ch/frame_guidelines_nov_2002.htm. "In no case . . . may the permission of a community leader or other authority substitute for individual informed consent." *Id.* at Guideline 4 cmt. And Article 7 of the International Covenant on Civil and Political Rights ("ICCPR") provides: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Treaty Doc. No. 102-23 (1992), Art. 7. "It is through [Article 7 of the ICCPR] that society expresses the fundamental human value that is held to govern all research involving human subjects – the protection of the rights and welfare of all human subjects of scientific experimentation." CIOMS Guidelines at International Instruments and Guidelines. As the Second Circuit recognized, "by its terms" Article 7's prohibition against nonconsensual medical or scientific experimentation "is not limited to state actors;

rather, it guarantees individuals the right to be free from non-consensual medical experimentation by any entity – state actors, private actors, or state and private actors behaving in concert." Pet. App. 32a-33a.[2]

## REASONS FOR DENYING THE PETITION

The Petition broadly requests that *certiorari* be granted "to dispel confusion on questions that have bedeviled the lower courts in *Sosa*'s aftermath." Pet. at 11-12. Neither this case nor the cases cited by Petitioner evidence confusion or bedevilment. As to the two questions raised by Petitioner, the Second Circuit properly applied *Sosa* in a manner entirely consistent with the rulings of other circuit courts that Petitioner wrongly contends are in conflict. Indeed, both the Second Circuit's decision and the decisions purportedly in conflict turn on the application of clear principles articulated in *Sosa* to highly unusual, and likely non-

2. The norm prohibiting nonconsensual medical experimentation applies with particular force when subjects, as in this case, are members of a vulnerable population. *See* Declaration of Helsinki at A.9 ("Some research populations are particularly vulnerable and need special protection. These include those who cannot give or refuse consent for themselves and those who may be vulnerable to coercion or undue influence."); CIOMS Guidelines at General Ethical Principles ("[S]pecial provision must be made for the protection of the rights and welfare of vulnerable persons."); Human Rights Committee, General Comment 20, Article 7, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994) (Under Article 7 of the ICCPR, "special protection in regard to [medical experiments] is necessary in the case of persons not capable of giving valid consent . . . .").

recurring, fact patterns.[3] Thus, *certiorari* should be denied inasmuch as any ruling in this case would not resolve a circuit conflict and otherwise add little, if anything, to the general jurisprudence regarding the ATS.[4]

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3. Inasmuch as this case presents such unusual circumstances, Petitioner grossly overstates the importance of this case for American companies engaged in international commerce. Indeed, Pfizer was not engaged in international commerce at all in this case. Pfizer tested Trovan on Nigerian children hoping that the experiment would aid Pfizer's Food and Drug Administration ("FDA") approval efforts in the United States. Arguably, a primary reason Nigeria was involved in the process was because the Nigerian children were vulnerable to nonconsensual experimentation. Indeed, it is highly unlikely that Pfizer would have conducted the Trovan study with the same disregard for subjects' rights if those subjects were American children, rather than Nigerian children. Thus, to the extent this case involves international commerce, it does so only by raising the question whether a multinational corporation is entitled to act with impunity when it engages in conduct abroad, for primarily domestic purposes, in a manner that patently disregards clear and binding international legal norms.

4. Respondents note that on July 31, 2009, after the petition was filed, Pfizer announced it had entered into a signed settlement with Nigerian authorities obliging Pfizer to pay $75 million to settle both civil and criminal charges brought against it in Nigeria, arising out of the 1996 Trovan study. *See* Joe Stephens, *Pfizer to Pay $75 Million to Settle Trovan-Testing Suit*, Wash. Post, July 31, 2009, *at* http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073001847.html. A fund is supposedly being set up for the benefit of the Respondents, amongst others. Were Respondents to accept payment in Nigeria and release their claims, Petitioner's request for *certiorari* may be rendered moot.

## I. THIS PETITION DOES NOT PRESENT A QUESTION WORTHY OF *CERTIORARI* REGARDING WHETHER PFIZER WAS A STATE ACTOR

Petitioner contends the Second Circuit's finding that the Complaints' allegations adequately asserted Pfizer was a state actor is in conflict with its sister circuits. It is long-recognized that a non-governmental entity may be deemed a state actor under the ATS if it "acted in concert" with the State – *i.e.*, "under color of law" as this term is understood in 42 U.S.C. § 1983 actions. *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995).[5] According to Petitioner, the Second Circuit erred specifically because it failed to find that Pfizer was alleged to "kn[o]w of or participate[] in the specific conduct . . . claimed to violate international law . . . ." Pet. at 14.

### A. Even Under Petitioner's Proposed Standard, Respondents Allege State Action

Petitioner wrongly characterizes the lower courts' rulings. Both the Second Circuit and the District Court found that Respondents adequately pled that the Nigerian government and Pfizer were "joint participants" in the Trovan experiment. *See Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118, 2002 U.S. Dist. LEXIS 17436, at *18 (S.D.N.Y. Sept. 17, 2002); Pet. App. 11a

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5. *Kadic*, as well as many other cases discussed below, hold that purely private actors may be liable under the ATS for conduct that violates the law of nations. *Id.* at 239. *See* discussion at Part II *infra*.

(noting the District Court concluded "Pfizer's collusion with the Nigerian government made it a state actor"); Pet. App. 50a-52a (relying on *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 294 (2001)) (holding Respondents "meet the state action test because they adequately allege that the violations occurred as the result of concerted action between Pfizer and the Nigerian government"); Pet. App. 50a (finding Respondents adequately alleged the Nigerian government was "involved in all stages of the Kano test" and "participated in the conduct that violated international law").[6] Allegations that Nigeria (1) provided a request letter to the FDA authorizing the export of Trovan, (2) arranged Pfizer's accommodations in Kano's IDH, a state-run hospital, (3) assigned government physicians to work with Pfizer, (4) improperly back-dated a pre-test "approval letter" required under international protocol, and (5) "act[ed] to silence" Nigerian physicians critical of Pfizer's Trovan experiment formed, in part, the basis of the District Court's conclusion. *Abdullahi*, 2002 U.S. Dist. LEXIS 17436, at *17-18. The Second Circuit noted, in addition to those allegations highlighted by the District Court, allegations that (1) the "Nigerian government and government officials" assisted in the unlawful conduct, (2) the Kano experiment was "jointly administered" by American and Nigerian members of Pfizer's team, and (3) the Nigerian

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6. Although Pfizer contends that the Second Circuit's decision is in conflict with other circuits' analyses of claims brought under 42 U.S.C. § 1983, there is no such conflict. The Second Circuit's application of Section 1983 in this case – finding State participation in the unlawful conduct (Pet. App. 50a) – is fully in accord with the cases Pfizer asserts are "in tension" with the Second Circuit in this regard. *See* Pet. at 16 n.6.

government, "according to a Nigerian physician involved in the Trovan experimentation, appeared to 'back[]' the testing." Pet. App. 51a.

The Second Circuit's decision in no way expands the concept of state actor under the ATS. Even if this Court were to accept Petitioner's proposed "knowledge or participation" test for determining whether a private actor functions as a state actor, Respondents' allegations as described above satisfy that test. Moreover, even if the allegations in the Complaints were somehow deemed inadequate on this point, on repleading such inadequacy could be cured quickly and easily by reference to, *inter alia*, Pfizer's own public statements. *See, e.g.*, Press Release, Pfizer Inc., Pfizer Statement on Trovan (May 29, 2007), *at* http://media.pfizer.com/files/news/trovan_statement_may292007.pdf ("Pfizer continues to emphasize – in the strongest terms – that the 1996 Trovan clinical study was conducted with the full knowledge of the Nigerian government . . . ."); Press Statement, Pfizer Inc., Trovan Fact Sheet, *at* http://media.pfizer.com/files/news/trovan_fact_sheet_final.pdf (noting extensive communications, prior to the Trovan experiment, with "Nigeria's NAFDAC, Ministry of Health and Ministry of Finance as well as the U.S. Food and Drug Administration, discussing and approving the study").

Thus, assuming *arguendo* that the Second Circuit's analysis was in error, under the analytic approach put forth by Petitioner, Respondents have stated or could easily state a claim that comes within ATS jurisdiction to hear that claim. In such a case, *certiorari* should be denied, as this Court will otherwise become entwined in unripe issues subject to further development.

### B. The Second Circuit's Decision Is Consistent With Those of Other Circuits

Neither the Fifth, Ninth, nor Eleventh Circuit decisions cited by Petitioner are in conflict with the Second Circuit, and therefore there is no ground for a grant of *certiorari* pursuant to this Court's Rule 10.

The Ninth Circuit, in one case, required that plaintiffs plead that acts were committed "pursuant to or in furtherance of a State or organizational policy" *not* because this was required under the ATS, but because this element was required pursuant to Article 7.2 of the Rome Statute of the International Criminal Court ("Rome Statute"), which the Ninth Circuit assumed to apply to the underlying claim "because the parties made this assumption." *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 741 (9th Cir. 2008). In this case, no party contends that the Rome Statute governs the underlying claim, so provisions of the Rome Statute do not apply, and *Abagninin* has no bearing on this case.

The Eleventh Circuit's decision in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) is not in conflict with the Second Circuit's decision; indeed, it found that defendant was a state actor based on allegations of government officials' participation in the wrongful events, as the Second Circuit found occurred in Nigeria. To the extent the Eleventh Circuit concluded that police inaction in response to the wrongdoing did not amount to state action, that was because the complaint provided "no factual basis to infer the police made a knowing choice to ignore Plaintiffs' alleged plight . . . ." *Id.* at 1249.

Specifically, with regard to "alleged torture occurring indoors," the physical proximity of the police to the acts could not provide "a reasonable basis for knowledge or intent on the part of the police." *Id.* On the other hand, if the police had known what was going on but looked the other way, *Aldana* presumably would have found state action. In this case, it is clearly alleged that Nigerian officials knew of and participated in the unlawful conduct, and that when facilitating that conduct required looking the other way, they did so. Thus *Aldana* is not in conflict.[7]

Finally, Petitioner relies upon the Fifth Circuit's affirmance, prior to *Sosa*, of the district court's dismissal in *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 374 (E.D. La. 1997), but the Fifth Circuit expressly declined to address state action in affirming the district court's opinion. *See Beanal v. Freeport-McMoRan, Inc.*, 197 F.3d 161, 166 (5th Cir. 1999). As the Fifth Circuit did not reach the issue, there can be no circuit conflict based on *Beanal*.

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7. Petitioner also relies upon the Eleventh Circuit's decision in *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008), which interpreted state action in the context of the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note. As the Eleventh Circuit recognized, the TVPA requires "proof of a symbiotic relationship between a private actor and the government." *Romero*, 552 F.3d at 1316-17. This case, by contrast, does not involve the TVPA and its unique statutory standard, and therefore reliance on *Romero* for purposes of establishing a conflict is improper.

### C. Respondents' Claims Succeed On An Independent Basis And Resolution Of The Question Presented Is Unnecessary

Even if there were a conflict regarding what is necessary to show state action, or if Respondents were unable to show state action in this case, *certiorari* should be denied because state action is not required to sustain a claim under the ATS. Indeed, this Court in *Sosa* clearly contemplated international norms reaching private actors, as in this case. *See Sosa*, 542 U.S. at 732 n.20; *id.* at 760 (Breyer, J., concurring). And, as shown in Part II of this Argument, many cases across the circuits have considered without reservation ATS claims even when no state action is alleged. Indeed, Petitioner has not cited a single circuit court decision holding that state action is required to state a claim under the ATS. This is because there is no such requirement.[8]

### D. This Appeal Turns On Highly Specialized Facts That Are Unlikely To Recur

Under Section 1983, which guides the analysis of state action in ATS cases, this Court has recognized that the inquiry regarding state action "is a matter of

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8. *Sosa* is consistent with the Second Circuit's well-reasoned conclusion in *Kadic* that private actors have been (since the earliest days of the ATS) and may be found liable for violations of norms of international law. *See Kadic*, 70 F.3d at 239-40. Petitioner does not dispute this, acknowledging a "narrow category of activities . . . as to which international law norms have been held enforceable against purely private actors." Pet. at 23. Petitioner does not explain, however, what distinguishes the international norm prohibiting nonconsensual medical testing from these activities.

normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad.*, 531 U.S. at 295-96 (noting that "[f]rom the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action"). In other words, a state action determination is highly fact-dependent. "[A] host of facts" can bear on the question including, with respect to the treatment of a private actor as a state actor: (1) a private actor's "willful participa[tion] in joint activity with the State or its agents"; (2) control of a private actor by an agency of the State; (3) delegation to a private actor, by the State, of a public function; and (4) a private actor's "entwine[ment] with government policies." *Id.* at 296 (quotations omitted); *see also id.* at 298 (noting state action is a "necessarily fact-bound inquiry").

Because of the fact-based nature of this inquiry, and the peculiar fact patterns found in this case as well as the cases Petitioner contends are in conflict, questions of state action turn on specific, unusual facts rather than on generalized legal principles, making *certiorari* inappropriate when those legal principles, as in this case, have been correctly articulated and the factual record is, at the pre-discovery stage, as yet undeveloped. That another circuit court hypothetically might have applied the same established law to the facts of this case and reached a different conclusion is not a sufficient basis to grant the Petition. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

## II. THIS CASE DOES NOT PRESENT A QUESTION WORTHY OF *CERTIORARI* REGARDING WHETHER PETITIONER'S MISCONDUCT IS ACTIONABLE UNDER THE ATS

Petitioner cannot deny that the Second Circuit articulated, analyzed, and applied the proper legal standard set out in *Sosa* regarding the scope of available claims against private actors under ATS jurisdiction. All Petitioner presents is a disagreement over the Second Circuit's particular application of *Sosa* to the facts of this case.

### A. This Court Need Not Reach This Issue

Petitioner's second "Question Presented" is premised on an absence of state action. Because the District Court and the Second Circuit both properly found state action, this second "Question Presented" is merely academic, and will not resolve any issue relevant to the litigation.

### B. The Second Circuit's Decision Is Consistent With *Sosa*

Under this Court's ruling in *Sosa*, claims for violation of international common law may be brought pursuant to the ATS when they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Sosa*, 542 U.S.

at 725.[9] Applying *Sosa* to the facts of this case, the questions before the Second Circuit were whether (1) there is a norm against nonconsensual medical experimentation and (2) this norm is specifically defined. These questions were properly asked, analyzed, and answered.

There can be no serious question that the Second Circuit correctly considered *Sosa* in reaching its conclusion. The Second Circuit held that "[t]he prohibition on non-consensual medical testing" meets the *Sosa* standard "because, among other reasons, (1) the norm is specific, focused and accepted by nations around the world without significant exception," (2) the norm "is every bit as concrete – indeed even more so – than the norm prohibiting piracy . . . , or interference with the rights of safe conduct and the rights of ambassadors," and (3) the norm is of "mutual concern" to the States. Pet. App. 26a, 41a, 43a. Assuming *arguendo* that Petitioner is correct that the Second Circuit's decision is in error, that error is, again, "the misapplication of a properly stated rule of law," and fact application "rarely" should give rise to a grant of *certiorari*. Supreme Court Rule 10.

It is clear, however, that the Second Circuit's decision was not in error. Petitioner's argument is premised on the notion that nonconsensual medical experimentation on children "bears no resemblance to

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9. The ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations . . . ." *Sosa*, 542 U.S. at 731 n.19.

the narrow categories of activities – war crimes, slave trade, piracy, or genocide – as to which international law norms have been held enforceable against purely private actors." Pet. at 23. But Petitioner's position ignores the two questions central to the *Sosa* analysis. First, is there a norm under international law prohibiting nonconsensual medical experimentation? Second, is this norm specifically defined? These questions – and not the formalistic categories suggested by Petitioner – guide determinations of the "resemblance" between conduct properly considered under the ATS. In this case, the answer to these questions is undoubtedly yes. Tellingly, Petitioner makes no claim that medical experimentation without consent is proper when the subjects are Nigerian children. Instead, Petitioner's defense is that it obtained proper consent – a defense that relies on a record not yet developed due to Petitioner's extensive efforts to keep this case from moving forward. Petitioner's principal merit-based objection to the Second Circuit's well-reasoned analysis is that no treaty specifically authorizes a claim against Pfizer for its misconduct. But, as the Second Circuit recognized, treaties are important but non-exclusive evidence of international legal norms. *See* Pet. App. 40a (Petitioner's view "rests on the mistaken assumption that ratified international treaties are the only valid sources of customary international law for ATS purposes.").

Indeed, far from expanding ATS liability under *Sosa*, the Second Circuit's decision represents a clear example of the type of case *Sosa* contemplated under the ATS. *Sosa* did not close the door on ATS claims outside the realms of piracy, safe conducts, and

the rights of ambassadors. Because the factual circumstances and pertinent international legal authorities in this case plainly implicate a specific and defined international norm prohibiting nonconsensual medical experimentation, violated by Petitioner, a decision barring ATS jurisdiction in this case would contravene the holding of *Sosa*. *See Sosa*, 542 U.S. at 724. In *Sosa*, this Court found ATS claims based on "the present-day law of nations" cognizable under the statute so long as they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725. The Second Circuit's decision in this case considered and adhered to that standard. Petitioner merely seeks to reargue matters already resolved.

### C. The Second Circuit's Decision Is Consistent With Those of Other Circuits

An examination of the cases Petitioner relies upon as being in conflict with the Second Circuit makes clear that the Second Circuit was not only consistent with *Sosa*, but also with its sister circuits. Each of the cases relied upon by Petitioner rejected claims on the ground that there was no defined international norm violated. None of these cases rejected ATS claims because (1) the defendant was a private actor, (2) the violation was of the law of nations instead of a specific treaty, or (3) the violation was not for piracy and did not concern the rights of safe passage or the rights of ambassadors.

In *Cisneros v. Aragon*, 485 F.3d 1226 (10th Cir. 2007), the court rejected claims that a 15-year-old woman's

sexual relations with her 19-year-old husband constituted statutory rape and violated the ATS. That rejection was based on a *Sosa*-informed analysis, and specifically on the conclusion that there was no "consensus among nations" that this activity was illegal. *Cisneros*, 485 F.3d at 1230. Petitioner, by contrast, clearly violated a "consensus among nations" that nonconsensual medical experimentation is illegal.

In *Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007), the court rejected claims brought by the non-custodial father of children against the children's mother, who took them out of their home country without the father's permission. That case, as in *Cisneros*, turned merely on whether any international norm was violated: the father "simply failed to produce sufficient evidence that there is an international consensus that the sort of 'parental child abduction' alleged in the complaint is a wrong so generally and universally recognized that it becomes a violation of the law of nations within the meaning of the ATS." *Taveras*, 477 F.3d at 782. In this case, by contrast, nonconsensual medical experimentation is generally and universally recognized as a violation of international law.

In *Abagninin*, the Ninth Circuit rejected claims that a company's use of a poisonous pesticide constituted genocide violated the ATS, but for narrow reasons. In that case, defendant company was alleged to have knowledge of the deadly effects of the pesticide, but no specific intent to cause genocide. The Ninth Circuit, in considering *Sosa*, did not rest its decision on whether the actor was private or whether genocide was actionable under the ATS, but rather on a specific ruling that "customary international law defines genocide as

requiring specific intent," while defendants in that case were alleged only to have knowledge, but no intent. *Abagninin*, 545 F.3d at 740. In other words, there was a norm but plaintiff's allegations failed to show a violation of the norm. To the extent Petitioner infers from *Abagninin* a state action requirement, that is based on a misstatement of the case. The state action requirement in *Abagninin* applied: (1) only to plaintiff's crimes against humanity claim; (2) only because that claim was based on the Rome Statute; and (3) only because the parties did not dispute that the Rome Statute required state action as an element of plaintiff's claim. *See id.* at 740-42 (assuming "because the parties do" that plaintiff's claim for crimes against humanity required "a course of conduct 'pursuant to or in furtherance of a State or organizational policy'") (quoting Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, Art. 7.2(a) (1998), *at* http://untreaty.un.org/cod/icc/statute/romefra.htm.). *Abagninin* cannot be read to impose a state action requirement under the ATS, either generally or arising from *Sosa*. Nor can *Abagninin* be read as presenting a conflict in this case.

Petitioner similarly has misread the Eleventh Circuit's decision in *Aldana*. Contrary to Petitioner's contentions, that case dismissed plaintiffs' arbitrary detention and crimes against humanity claims for reasons having nothing to do with whether they were the result of state action.[10] Instead, the claims were dismissed because of the "short

10. In fact, the Eleventh Circuit considered the state action question *only* in connection with plaintiffs' torture claims, which was required inasmuch as "[t]he text of the Torture Victim Protection Act expressly requires the element of state action." *Aldana*, 416 F.3d at 1247.

duration" of the detention in question. *Id.* In this case, by contrast, there is no mitigating factor (such as "short duration") or factual exoneration that makes Pfizer's misconduct anything less than a violation of an international norm. The *Aldana* court ultimately rejected plaintiffs' crimes against humanity claims because there was no evidence that the misconduct applied to more than a narrow group of persons. In this case, by contrast, Pfizer's misconduct applied to a community of powerless, sick Nigerian children and their families. *Aldana* is not at odds with this case.

As none of these cases conflicts with the Second Circuit's decision, *certiorari* should be denied.

### D. The Second Circuit's Decision Is Highly Specific To Its Facts

The Second Circuit's decision sustaining Respondents' ATS claim required a careful consideration of historical precedent, treaties, and statements that narrowly apply to the misconduct asserted – nonconsensual medical experimentation on certain foreign, impoverished children. One hopes this is not a recurring phenomenon or regular occurrence, as neither Pfizer nor any other major pharmaceutical company asserts that it has a right to conduct medical experiments without consent. Thus, any ruling in this matter would be unique to the facts of this case and have at best minimal effect on other claims brought pursuant to the ATS.[11]

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11. Indeed, the Second Circuit recognized that ATS jurisdiction would not apply to "instances of routine or isolated failures by medical professionals to obtain informed consent, such as those arising from simple negligence." Pet. App. 43a. The facts of this case are, of course, far worse.

Indeed, inasmuch as *Sosa* established a framework for reviewing whether claims against private actors can proceed under the ATS, there is no significant guidance this Court can add through review of this case. The Second Circuit's analysis was correct in its determination that nonconsensual medical experimentation violated a specifically defined international norm. A review of that determination will be of little, if any, assistance to future courts reviewing ATS claims that do not present a fact pattern virtually identical to that in this case. Moreover, and importantly, review will place this Court in the role of gatekeeper with respect to practically every ATS claim that makes its way through the circuit courts – a role this Court should plainly avoid.

## CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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